

SEP 13 1977

MICHAEL RODAK, JR., CLERK

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IN THE  
**Supreme Court of the United States**  
OCTOBER TERM, 1977

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**No. 77-305**

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DORIS M. BAUER, LOU ANN MURPHY and  
BRUCE G. MURPHY,  
*Petitioners,*

v.

THOMAS W. GILLIAM, JR., ERLE COCKE, JR. and  
MADELYN GROTNES COCKE,  
*Respondents.*

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ON PETITION FOR A WRIT OF CERTIORARI TO THE  
UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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**MEMORANDUM OPPOSING CERTIORARI**

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*Of Counsel*

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Respondents, Thomas W. Gilliam, Jr., Erle Cocke, Jr. and Madelyn Grotnes Cocke, oppose the Petition for a Writ of Certiorari on the grounds that (1) there is no conflict of opinions between the Federal Circuits, (2) petitioners' failure to order and provide the Court of Appeals and this Court with a transcript of testimony in the record on appeal effectively prevented the Court of Appeals from evaluating the propriety of the jury instructions given by the trial court, and will similarly prevent any meaningful review by this Court, and (3) this case is not one of the sort to be reviewed by the Supreme Court.

Respondents represent to the Court as follows:

1. Petitioners' *Statement of the Case* is unsupported by any testimony at trial and in many instances said *Statement* misstates the facts. It assumes as facts issues on which there was sharply conflicting evidence which conflicts were resolved by the jury against petitioners.

2. Jury instructions must be evaluated in context with the evidence adduced at trial. Petitioners' failure to order a transcript of evidence and include it in the record on appeal effectively prevents any appellate court from adequately considering the propriety of the trial court's jury instructions.

3. Petitioners have not and cannot show any conflict of decisions among the various Federal Circuits which conflict needs to be resolved by this Court.

4. Assuming *arguendo* that such a conflict was presented, it should only be resolved by this Court upon a full and reasoned opinion of the Circuit Court. In the instant case the Court of Appeals was denied the opportunity to fully consider the correctness of the trial court's jury instructions by the inadequacy of the record on appeal. The Court of Appeals therefore issued its unpublished opinion without oral argument. Consideration of this case by the Supreme Court would result in frustration caused by the inadequacy of the record on appeal and would serve no useful purpose; it would in fact constitute a waste of this Court's time and energy.

THEREFORE, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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September, 1977